LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
NOV 12 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 571

GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida

MELVIN B. GROSSMAN
Assistant Attorney General
State of Florida
Counsel for Respondent
State Office Building (530)
1350 N. W. 12th Avenue
Miami, Florida 33136

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1-2-3
QUESTION PRESENTED	3
REASONS FOR NOT GRANTING THE WRIT	4-5-6-7
CONCLUSION	8
AFFIDAVIT OF SERVICE	9

TABLE OF CITATIONS

CASES

	Page
Brown v. United States, 375 F.2d 310 (D.C. Cir., 1967)	5
Bruton v. United States, — U.S. —, 20 Law.Ed. L.Ed.2d 476, 88 S.Ct. 1620 (1968)	3-4-5-6-7
Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965)	7
Krulewitch v. United States, 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716 (1949)	6-7
Opper v. United States, 348 U.S. 84, 99 L.Ed. 101, 75 S.Ct. 158 (1954)	4
Palmer v. State, 106 Fla. 237, 145 So. 69 (1932)	4
People v. Norman, 60 Cal. Rptr. 609 (1st D.C.A., Cal. 1967)	7
Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965)	7
Smith v. United States, 385 F.2d 34 (5th Cir., 1967)	5-6
Spars v. United States, 156 U.S. 51, 39 L.Ed. 343, 15 S.Ct. 273 (1895)	6-7
Suarez v. State, 95 Fla. 42, 115 So. 519 (1928)	4
United States v. Frazier, 394 F.2d 258 (4th Cir., 1968)	5-6

OTHER AUTHORITIES

5 Wigmore, Evidence, 3rd ed. 127, Section 1396	7

STATUTES

Florida Statutes, Section 776.011	2
Florida Statutes, Section 810.01	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

An information for breaking and entering a dwelling was filed against Frank Hiram Beauchamp and the petitioner, Gary James Sylvia, in the Criminal Court of Record of Dade County, Florida (R. 534-536). The petitioner was charged in the information as a principal in the first degree for aiding, abetting and otherwise pro-

curing the co-defendant Beauchamp to escape from the scene of said crime, to escape detection, arrest and punishment in violation of Section 810.01, and Section 776.011, Florida Statutes.

The petitioner entered a plea of not guilty (R. 537); filed a motion for severance (R. 541-542), which was denied (R. 546); filed a motion to suppress, which was denied (R. 14) and a motion to quash (R. 538-539) which was denied (R. 547). The petitioner's motion for bill of particulars (R. 539-541) was granted in part and denied in part (R. 546).

Trial by jury was had on May 4, 1967. At the trial, the following evidence was introduced:

One Julius Deitch, an informer, testified that he met defendant Sylvia at the apartment of one Doreen Greer on March 8, 1967 (R. 237). After leaving the apartment, Julius Deitch, the petitioner, Sylvia, and Beauchamp, the co-defendant, went to the latter's apartment (R. 240). Conversation was had among the three men concerning the contemplated robbery (R. 240). No further conversation was had until approximately 6:00 p.m., on the night of the robbery. At that time the same three men, Deitch, Sylvia and Beauchamp drove past the intended residence (R. 242). Sylvia was present during conversation between Beauchamp and Deitch concerning what they would do (R. 242). Sylvia was present at a discussion in Beauchamp's apartment when Beauchamp laid out the structure of the Schiff house with toothpicks (R. 245). The petitioner asked Deitch if a piece (a gun) were needed (R. 283). The three men thereafter went to a restaurant where they were observed by two police officers (R. 118). The three men were together in the

parking lot for ten or fifteen minutes before leaving in Deitch's vehicle (R. 120). The two officers followed the three men and parked on the opposite side of the street about 60 yards away in an unmarked car. Beauchamp and Deitch left the car. The petitioner remained in Deitch's car in the driver's seat, behind the wheel (R. 299). The police, having been forewarned, were present in the house and apprehended the co-defendant (R. 132, 253). Meanwhile, the petitioner who had been waiting outside behind the steering wheel of the car, was arrested (R. 299, 300).

The jury rendered a verdict finding the petitioner guilty (R. 563). The petitioner was sentenced to imprisonment by confinement at hard labor in the State penitentiary for eight years (R. 564). An appeal was unsuccessfully taken to the District Court of Appeal, Third District of Florida. The opinion of the latter court is reported at 210 So.2d 286 (3rd D.C.A., Fla. 1968).

QUESTION PRESENTED

The Respondent respectfully rephrases the question presented by the Petitioner as follows:

> WHETHER THIS COURT'S HOLDING IN BRUTON v. UNITED STATES, — U.S. —, 20 L.ED. 2D. 476, 88 S.CT. 1620 (1968) REQUIRES A SEVERANCE WHERE ONE OF TWO DEFENDANTS, AT A JOINT TRIAL, RELIES UPON THE DEFENSE OF ENTRAPMENT?

REASONS FOR NOT GRANTING WRIT

THIS COURT'S HOLDING IN BRUTON v. UNITED STATES, — U.S. —, 20 L.ED.2D 476, 88 S.CT. 1620 (1968) DOES NOT REQUIRE A SEVERANCE WHERE ONE OF TWO DEFENDANTS, AT A JOINT TRIAL, RELIES UPON THE DEFENSE OF ENTRAPMENT.

The law in the State of Florida is clearly that the matter of severance is discretionary with the trial judge. See e.g. **Suarez v. State**, 95 Fla. 42, 115 So. 519 (1928). However, the Supreme Court of Florida has also held that where defenses or interests of joint defendants are antagonistic, or where evidence which is incompetent as to a defendant and prejudicial to him is introduced against a co-defendant, "it constitutes reversible error, unless the record shows that no injury resulted therefrom to the movant." **Palmer v. State**, 106 Fla. 237, 145 So. 69 (1932). In the instant case, the Florida Third District Court of Appeal, finding sufficient, competent evidence to support the conviction, held:

> "We fail to find an abuse of discretion on this record, although it might be better policy [when two defendants are charged and it is apparent, prior to trial, that one will put on no evidence and the other will rely on the defense of entrapment] that they not be tried together."

It would appear that the same view obtains in the Federal courts. **Opper v. United States**, 348 U.S. 84, 99 L.Ed. 101, 75 S.Ct. 158 (1954). Furthermore, it is clear

that the desire of the defendant to call a co-defendant as a witness is not in and of itself sufficient grounds for reversal. **United States v. Frazier**, 394 F.2d 258 (4th Cir., 1968); **Smith v. United States**, 385 F.2d 34 (5th Cir., 1967). The fact that a co-defendant's defense does nothing to exculpate an accused is likewise not error per se. **Brown v. United States**, 375 F.2d 310 (D.C. Cir., 1967). In the latter case, the Court of Appeals, District of Columbia Circuit, held that the fact that a co-defendant relied upon a defense of insanity did not by itself constitute sufficient grounds for reversal for failure to sever.

In the instant cause, the petitioner seeks issuance of a writ of certiorari on the basis that his right to confrontation under the Sixth Amendment of the United States Constitution as applied by this Court in **Bruton v. United States**, supra, was violated. The respondent respectfully contends that the holding of this Court in **Bruton** does not support his contention. The respondent further contends that the only thing that **Bruton** has in common with the instant case is that in both cases a severance was sought.

In **Bruton**, virtually the only evidence supporting the defendant's conviction was the confession of his co-defendant which directly implicated him. This Court, in the prior case, stated that these were powerfully incriminatory statements, inevitably suspect, and because no severance had been granted, unable to be tested by cross-examination. The introduction of the confession, this Court found, "posed a substantial threat" to the defendant's right to confront witnesses against him.

In the instant case there was no confession. It is true that hearsay statements made by petitioner's co-defendant out of the petitioner's presence were introduced. These were, however, admissible under the rule etablished by this Court. **Krulewitch v. United States,** 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949); **Spars v. United States,** 156 U.S. 51, 39 L. Ed. 343, 15 S. Ct. 273 (1895). Moreover, this was not the sole link between the charged offense and the petitioner. The record of the trial court proceedings contains testimony by an informer that the petitioner was present at the time the offense was contemplated and planned; that the petitioner drove the automobile, with the co-defendant and the informer, to the location previously decided on; and that the petitioner waited in that automobile for the successful return of the co-defendant and the informer.

The fact that testimony as to conversations outside the petitioner's presence were introduced does not bring this case within the rule established by this Court in **Bruton.** Whether or not a severance had been granted, the petitioner, in seeking to elicit testimony from his co-defendant, would nonetheless have been confronted with the latter's right to remain silent; and his desire in this regard does not constitute sufficient grounds for severance. **United States v. Frazier,** supra; **Smith v. United States,** supra. Nor can it be said here that the inability of petitioner's trial counsel to prosecute a silent co-defendant in argument to the jury, "posed a threat to petitioner's right to confront the witnesses against him." **Bruton v. United States,** supra.

It is clear from the holdings of this Court that the Sixth Amendment right of confrontation of witnesses against a defendant is binding upon State court proceedings. **Pointer v. Texas**, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). However, it is also clear that this right is primarily one of cross-examination and that, in effect, it adopts the hearsay rule with all of that rule's many exceptions. **Pointer v. Texas**, supra; **Douglas v. Alabama**, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965); 5 Wigmore, Evidence, 3rd. ed. 127, Section 1396. Nor is it disputed by the petitioner that extra-judicial statements of a co-conspirator in the furtherance of the planned offense are admissible. **Krulewitch v. United States**, supra. This is especially true when the statements are made in the presence of the defendant. **Spars v. United States**, supra; **People v. Norman**, 60 Cal. Rptr. 609 (1st D.C.A., Cal. 1967).

The test established by this Court in **Bruton v. United States**, supra, is that a severance should be granted if a joint trial poses a substantial threat to an accused's right of confrontation. The respondent respectfully submits that such cannot be said to have occurred here.

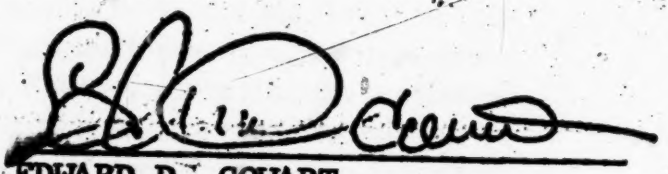
CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal, Third District of Florida, is not in conflict with applicable Federal law or any decision of this Court. Therefore, there has been no showing by the petitioner of any abridgement of his constitutional rights. For these reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
State of Florida

MELVIN B. GROSSMAN
Assistant Attorney General
State of Florida



EDWARD D. COWART
Assistant Attorney General
State of Florida

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. _____
GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, MELVIN B. GROSSMAN, Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief for the Respondent to the Supreme Court of the United States was served upon HONORABLE MILTON E. GRUSMARK, Attorney for Petitioner, 1674 Meridian Avenue, Suite 311, Miami Beach, Florida 33139, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 7th day of November, 1968.

MELVIN B. GROSSMAN
Assistant Attorney General

Sworn to and subscribed before me at Miami, Dade County, Florida, this 7th day of November, 1968.

Linda R. Emerick
NOTARY PUBLIC
State of Florida at Large
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES NOV. 4, 1971
BONDED THROUGH FRED W. DIESTELHORST